UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	)	No. 0:14-md-02551 (SRN/ BRT)
This Document Relates To:	)	**PLAINTIFFS' CORRECTED REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL**
ALL ACTIONS.	)	**(REDACTED)**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PLAINTIFFS' REPLY TO THE NHL'S "ALTERNATIVE FACTS" 2

A. Both Modern and Historic Science Support the Connection Between NDDCs and Repeated Head Trauma 2

B. The NHL's "Approach" to Player Safety and Warnings of the Risks of Head Hits Has Never Been Sufficient 6

III. REPLY ARGUMENT 7

A. Class 1 Meets the Requirements of Rule 23(b)(2) 7

1. Plaintiffs' Proposal Is Properly Evaluated Under Rule 23(b)(2) 7

B. Choice-of-Law Rules Favor Class Certification 10

1. The Elements of Minnesota's Monitoring Remedy Apply 11

2. Minnesota's Choice-Influencing Factors Favor Application of New York's Duty Standards 13

a. Predictability 13

b. Governmental Interest 14

3. Applying Minnesota and New York Law Is Constitutional 16

4. Applying Minnesota's Monitoring Remedy Does Not Violate the Rules Enabling Act 17

5. Claimed State Law Differences are Not Outcome-Determinative 17

C. Individualized Factual Determinations Do Not Preclude Class Certification of Class 1 20

1. All Class Members Deserve Medical Monitoring 20

2. Factual Variations Do Not Defeat Certification 21

3. Common Evidence Establishes the NHL's Duty and Breach 21

4. Common Evidence Establishes the Requisite Medical Monitoring Injury 23

5. The NHL's Purported Individualized Issues Undermining Medical Monitoring are Incorrect and Misleading 24

a. Positional Exposure to Head Trauma Varies Only Nominally 24

6. The NHL's Affirmative Defenses Do Not Prevent Certification 25

a. The NHL's Assumption of the Risk Defense Fails 26

b. The NHL's Statute of Limitations Defense Fails 27

D. Class 2 Meets the Standards for Rule 23(c)(4) Certification 28

E. Class 2 Is Ascertainable 30

F. The Proposed Class Representatives Are Adequate 30

1. *Res Judicata* is Inapplicable 31

2. The Proposed Medical Monitoring Class Is Not a Settlement Class 31

G. Plaintiffs Are Not Required to Meet the Superiority Requirements of Rule 23(b)(2) 32

IV. CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Allen v. McCurry,
449 U.S. 90 (1980) 31

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 32

Arch v. Am. Tobacco Co.,
175 F.R.D. 469 (E.D. Pa. 1997) 8, 9

Baber v. Dill,
531 N.W.2d 493 (Minn. 1995) 26

Baker v. Saint-Gobain Performance Plastics Corp.,
232 F. Supp. 3d 233 (N.D.N.Y. 2017) 10, 18

Bakhos v. Driver,
275 N.W.2d 594 (Minn. 1979) 26, 27

Billiar v. Minn. Min. & Mfg. Co.,
623 F.2d 240 (2d. Cir. 1980) 23

Blake Marine Grp. v. CarVal Inv'rs LLC,
829 F.3d 592 (8th Cir. 2016) 15, 16

Boughton v. Cotter Corp.,
65 F.3d 823 (10th Cir. 1995) 10

Bryson v. Pillsbury Co.,
573 N.W.2d 718 (Minn. Ct. App. 1998) 11

Bukowski v Clarkson Univ.,
971 N.E. 849 (N.Y. 2012) 27

Burke v. DJO,
2012 WL 383948 (D. Minn. Feb. 6, 2012) 12, 13

Byrd v. Aaron's Inc.,
784 F.3d 154 (3d Cir. 2015) 30

City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.,
867 F.3d 434 (3d Cir. 2017) 30

Cruz v. TMI Hosp., Inc.,
2015 WL 6671334 (D. Minn. Oct. 30, 2015) 28

Dalton v. Dow Chem. Co.,
158 N.W.2d 580 (Minn. 1968) 27

Davis v. Furlong,
328 N.W.2d 150 (Minn. 1983) 12

Donovan v. Philip Morris USA, Inc.,
268 F.R.D. 1 (D. Mass. 2010) 8

Doran v. Mo. Dep't of Soc. Servs.,
251 F.R.D. 401 (W.D. Mo. 2008) 26

Dryer v. NFL,
2013 WL 5888231 (D. Minn. Nov. 1, 2013) 13

Duncan v. Nw. Airlines, Inc.,
203 F.R.D. 601 (W.D. Wash. 2001) 9

Ebert v. Gen. Mills, Inc.,
823 F.3d 472 (8th Cir. 2016) 28

Elliott v. Chi. Hous. Auth.,
2000 WL 263730 (N.D. Ill. Feb. 28, 2000) 8

Erbe v. Lincoln Rochester Tr. Co.,
13 A.D.2d 211 (N.Y. App. Div. 1961) 28

Fluck v. Jacobson Mach. Works, Inc.,
1999 WL 153789 (Minn. Ct. App. Mar. 23, 1999) 14

Foss v. Kincade,
766 N.W.2d 317 (Minn. 2009) 15

Foster v. St. Jude Med., Inc.,
229 F.R.D. 599 (D. Minn. 2005) 12, 18

Gawarecki v. ATM Network, Inc.,
2014 WL 2600056 (D. Minn. June 10, 2014) 23

German v. Fed. Home Loan Mortg. Corp.,
885 F. Supp. 537 (S.D.N.Y. 1995)..... 8

Haberle v. Buchwald,
480 N.W.2d 351 (Minn. App. 1992)..... 27

Hood v. Gilster-Mary Lee Corp.,
2016 WL 5852866 (W.D. Mo. Sept. 30, 2016) 20

Hughes v. Wal-Mart Stores, Inc.,
250 F.3d 618 (8th Cir. 2001) 15, 16

In re Baycol Prods. Liab. Litig.,
218 F.R.D. 197 (D. Minn. 2003)..... 15, 18, 19

In re Copley Pharm., Inc.,
161 F.R.D. 456 (D. Wyo. 1995) 19

In re Deutsche Telekom Ag Sec. Litig.,
229 F. Supp. 2d 277 (S.D.N.Y. 2002)..... 26

In re Diet Drugs Prods. Liab. Litig.,
1999 WL 673066 (E.D. Pa. Aug. 26, 1999) 8, 21

In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.,
852 F.3d 268 (3d Cir. 2017)..... 4

In re Levaquin Prods. Liab. Litig.,
2010 WL 7852346 (D. Minn. Nov. 9, 2010) 12, 13

In re Literary Works in Elec. Databases Copyright Litig.,
654 F.3d 242 (2d Cir. 2011)..... 31

In re NCAA Student-Athlete Concussion Injury Litig.,
2016 WL 3854603 (N.D. Ill. July 15, 2016)..... 8

In re NLO,
5 F.3d 154 (6th Cir. 1993)..... 8

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.,
827 F.3d 223 (2d Cir. 2016)..... 32

In re Prempro,
230 F.R.D. 555 (E.D. Ark. 2005)..... 15, 18

In re Rhone-Poulenc Rorer,
51 F.3d 1293 (7th Cir. 1995) 19

In re Simply Orange Juice Marketing & Sales Practices Litig.,
2017 WL 3142095 (W.D. Mo. July 24, 2017) 28

In re St. Jude Med., Inc.,
425 F.3d 1116 (8th Cir. 2005) ..... passim

In re St. Jude Med., Inc.,
2003 WL 1589527 ..... 9, 12, 15

In re Target,
309 F.R.D. 482 (D. Minn. 2015) 25

In re Telectronics Pacing Sys., Inc., Accufix Atrial J Leads Prods. Liab. Litig.,
164 F.R.D. 222 (S.D. Ohio 1995) 19

In re Viagra Prods. Liab. Litig.,
572 F. Supp. 2d 1071 (D. Minn. 2008) 4, 5

In re Zurn Pex Plumbing Products Liab. Litig.,
644 F.3d 604 (8th Cir. 2011) 26

Jacobs v. Farmland Mut. Ins. Co.,
377 N.W.2d 441 (Minn. 1985) 13

Jones v. Chicago, St. P., M. & O. Ry. Co.,
83 N.W. 446 (Minn. 1900) 19

Kohen v. Pac. Inv. Mgmt. Co. LLC,
571 F.3d 672 (7th Cir. 2009) 31

Lamey v. Foley,
188 A.D.2d 157 (N.Y. App. Div. 1993) 27

Leiting-Hall v. Winterer,
2015 WL 1470459 (D. Neb. Mar. 31, 2015) 21

Lowe v. Philip Morris USA,
183 P.3d 181 (Or. 2008) 18

McKown v. Simon Prop. Grp.,
344 P.3d 661 (Wash. 2015) 14

Meridien Int'l Bank v. Liberia,
23 F. Supp. 2d 439 (S.D.N.Y. 1998) 27

Mooney v. Allianz Life Ins. Co.,
244 F.R.D. 531 (D. Minn. 2007) 13

Nagell v. United States,
392 F.2d 934 (5th Cir. 1968) 1, 22

Nagell v. United States,
1982 U.S. Cl. Ct. LEXIS 2377, at *1, *86, *96 (Ct. Cl. July 2, 1982) 1

Nelson v. Delta Int'l Mach. Corp.,
2006 WL 1283896 (D. Minn. May 9, 2006) 15

Nesladek v. Ford Motor Co.,
46 F.3d 734 (8th Cir. 1995) 11, 12

Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.,
1992 WL 121726 (N.D.N.Y May 23, 1992) 22

O'Connor v. Boeing N. Am., Inc.,
184 F.R.D. 311 (C.D. Cal. 1998) 8

Palmer v. 3M Co.,
2005 WL 5891911 (Minn. Dist. Ct. Apr. 6, 2005) 11

Patton v. Topps Meat Co.,
2010 WL 9432381 (W.D.N.Y. May 27, 2010) 19

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 16, 17

Pitts v. Farm Bureau Life Ins. Co.,
818 N.W.2d 91 (Iowa 2012) 14

Prokop v. Indep. Sch. Dist. No. 625,
754 N.W.2d 709 (Minn. App. 2008) 26

RGR, LLC v. Settle,
764 S.E.2d 8 (Va. 2014) 14

Rodriguez v. Del Sol Shopping Ctr. Assocs.,
326 P.3d 465 (N.M. 2014) 14

Schwan's Sales Enters., Inc. v. SIG Pack, Inc.,
476 F.3d 594 (8th Cir. 2007) 10

Sellars v. CRST Expedited, Inc.,
321 F.R.D. 578 (N.D. Iowa 2017) 28

Springrose v. Willmore,
192 N.W.2d 826 (Minn. 1971) 25

State Mut. Life Assur. v. Wittenberg,
239 F.2d 87 (8th Cir. 1956) 18, 19

Sun Oil Co. v. Wortman,
486 U.S. 717 (1988) 16

Thompson v. Am. Tobacco Co.,
189 F.R.D. 544 (D. Minn. 1999) 11

Wal-Mart v. Dukes,
564 U.S. 338 (2011) 31

Ward v. Dixie Nat'l Life Ins. Co.,
595 F.3d 164 (4th Cir. 2010) 31

Waste Mgmt. Holdings, Inc. v. Mowbray,
208 F.3d 288 (1st Cir. 2000) 28

Wegscheider v. Plastics, Inc.,
289 N.W.2d 167 (Minn. 1980) 26

Werlein v. United States,
746 F. Supp. 887 (D. Minn. 1990) 9, 11

Zaretsky v. Molecular Biosystems, Inc.,
464 N.W.2d 546 (Minn. Ct. App. 1990) 10, 11, 13

Zinser v. Accufix Research Inst., Inc.,
253 F.3d 1180 (9th Cir. 2001) 9

Statutes

28 U.S.C. §2072(b) 17

Minn. Stat. §604.01 ..... 20, 26

Rules

Fed. R. Civ. P. 23 ..... passim

Regulations

21 C.F.R. §§201.57(c)(6)-(7) 3

Other Authorities

Reference Manual on Scientific Evidence 552 (3d ed. 2011) 4

Manual for Complex Litig. (Fourth) at 427 (2004) 8

I. INTRODUCTION

The NHL opposes Plaintiffs' class motion on the backs of nineteen experts who reiterate variations of the themes: that CTE is fabricated; CTE is unrelated to hockey; repetitive brain trauma may not have ***any*** long-term risks at all; and the NHL was unaware of these risks even as it promoted fist-fighting for decades. The NHL simply ignores that the medical community – and the courts – have ***long recognized*** the dangers posed by repetitive brain trauma, particularly with respect to CTE. *See, e.g.*, *Nagell v. United States*, 392 F.2d 934, 937 (5th Cir. 1968) (combat soldier's *mens rea* for a bank robbery conviction negated by '"chronic traumatic encephalopathy' – a disease of the brain caused by trauma"); *Nagell v. United States*, 1982 U.S. Cl. Ct. LEXIS 2377, at *1, *86, *96 (Ct. Cl. July 2, 1982) (limitations period tolled when CTE "existed continuously since 1954 and was created by trauma to the brain").

Perhaps the factfinder might agree with the NHL that "***no credible scientific data*** suggest[s] that retired athletes ***from any contact sport***" are at an increased risk for developing a Neurological Disease, Disorder, or Condition ("NDDC") during or after their careers.[1] But Plaintiffs may also be correct that abundant literature and scientific

[1] Declaration of Christopher Randolph, Dkt. 732-11, ¶18.

opinions – and the NHL's own experts like Dr. Guskiewicz[2] – show permanent impairment can follow brain trauma, both immediately and long-term.[3]

But the outcome is not the question now presented. Instead, the question is "will the determination of these merits questions, resolve the case for every Class member?" The simple answer is "Yes," because the NHL's actions and inactions apply to every Class member.

The NHL's efforts to obfuscate these common issues and precipitate merits arguments should be rejected. Whether one state's law, a combination of two states, or a large grouping of states' laws that share relevant elements in common applies, all Class members have suffered the requisite injury to warrant medical monitoring, and Plaintiffs' proposed issue class warrants certification. Plaintiffs' class certification motion should be granted.

II. PLAINTIFFS' REPLY TO THE NHL'S "ALTERNATIVE FACTS"

A. Both Modern and Historic Science Support the Connection Between NDDCs and Repeated Head Trauma

Plaintiffs have articulated a compelling scientific basis for the propriety of class certification: brain trauma increases the risk of later-life negative health outcomes,

---

[2] *See, e.g.*, Guskiewicz, K., *et al.*, *Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 4 (Oct. 2005) at 719 (**Ex. 1**); Deposition of K. Guskiewicz at 46:14-49:4 (**Ex. 2**). All references to "Ex. __" refer to exhibits to the Supplemental Declaration of Charles S. Zimmerman ("Zimmerman Supp. Decl."), filed herewith.

[3] Just last month, widespread reports indicated that scientists had conducted "the most definitive study to date to find ***th[e] connection***" between repeated head trauma and CTE. *See* Nadia Kounang, *It's not concussions that cause CTE. It's repeated hits, a study finds*, CNN.com (Jan. 18, 2018), http://www.cnn.com/2018/01/18/health/cte-concussion-repeated-hits-study/index.html. (**Ex. 3**); *see also* Casper Supp. Decl., at 7 n.15.

including NDDCs, and the medical and scientific community has known that a head hit is detrimental to one's health ***for a long time***.[4] Mot. at 26-28.

What was known, and when, present common key questions generating common answers to whether the NHL had a duty of care to its players, and whether the NHL breached that duty by its continuing failure to warn or protect its players from NDDCs associated with head trauma. If the notion that repeated head hits have long-term risks is a new discovery (or still-to-be-discovered, as the NHL argues), then Plaintiffs' claims fail on a classwide basis. But if such information has been widespread within the medical community as Plaintiffs contend,[5] Plaintiffs' claims will succeed for all Class members because the same set of facts inform the answers to the duty and breach questions.

The NHL and its nineteen experts strive to atomize and thereby diminish established scientific knowledge. It has been long known that repetitive head blows could cause dementia pugilistica, with the same symptomology associated with CTE.[6] But the NHL argues that, because dementia pugilistica was not initially dubbed "CTE," and the particulars of the mechanics behind tauopathies are still being studied, the NHL has no duty to warn about risks.

The NHL seeks to impose an evidentiary burden not adopted by courts in related cases. To compel drug manufacturers to warn about adverse events,[7] for example, "a

---

4 *See* Casper Decl., ¶272.

5 Casper Decl., *generally*; Cantu Decl. §IV.A.2.

6 Casper Decl., ¶133 n.115.

7 *See* 21 C.F.R. §§201.57(c)(6)-(7) (**Ex. 4**).

causal relationship need not have been definitely established," and the duty to warn is based simply on "reasonable evidence." *Id.* This standard "could be met by a wide range of evidence, including evidence that would not also support a higher evidentiary standard[.]" *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 852 F.3d 268, 292 (3d Cir. 2017).

Using these guidelines, the FDA itself discusses traumatic brain injury[8] and directs readers to the CDC website that warns: "Repeated mild TBIs occurring over an extended period of time ***can result*** in cumulative neurological and cognitive deficits. Repeated mild TBIs occurring within a short period of time (*i.e.*, hours, days, or weeks) can be catastrophic or fatal."[9] Contrary to the NHL's central argument, reasonable evidence of a causal association between head trauma and NDDCs has already been established.

The critical flaw in the NHL's argument is its binary view that either causation exists (with a duty to warn) or association exists (with no duty to warn). But the NHL's own scientific literature indicates a spectrum.[10] The NHL ignores Eighth Circuit law that clinical trials are not mandatory for causation. The court in *In re Viagra Prods. Liab. Litig.* said "[t]he clinical trial is the 'gold standard' of medical research. When research from a clinical trial is unavailable, epidemiologic studies often are used to assess an

---

[8] *Traumatic Brain Injury: FDA Research and Actions*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/forconsumers/consumerupdates/ucm519116.htm (**Ex. 5**).

[9] *What are the Potential Effects of TBI?*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/traumaticbraininjury/outcomes.html (**Ex. 6**).

[10] M.D. Green, *et al.*, *Reference Manual on Scientific Evidence* 552 (3d ed. 2011) (noting that "An association identified in an epidemiologic study may or may not be causal.") (**Ex. 7**).

association between a drug and disease and in turn general causation." 572 F. Supp. 2d 1071, 1078 (D. Minn. 2008). ***Even the NHL's own experts*** acknowledge an abundance of studies and data supports the connection between NDDCs and repetitive head trauma, validating Plaintiffs' experts' opinions that this connection is "supported."[11]

Next, the NHL mischaracterizes literature to argue that NDDC's dangers do not reach hockey.[12] The NHL argues that discussion of dementia pugilistica was rare and isolated, but acknowledges a 1957 paper's conclusion, "Since [1928, 'punch-drunk'] has established itself in medical terminology, and a not inconsiderable literature has developed."[13] The NHL skips over decades of literature between 1973 and 2004, arguing that research "did not advance substantively" in that era, despite Dr. Casper identifying and discussing some ***232 articles*** on the topic during that period.[14]

---

[11] Guskiewicz Dep. 64:14-69:5 ([redacted]); *id.* at 71:14-17 ([redacted]); *id.* 73:23-74:8 ([redacted]); *id.* 77:6-78:5 ([redacted]); *id.* 141:1-142:17 ([redacted]) (**Ex. 2**); Deposition of Christopher Randolph 74-75, 88-90, 155-156 (**Ex. 8**) ([redacted]); Deposition of Lili-Naz Hazrati 102:23-25 ([redacted]); *id*. 217:13-15 ([redacted]), *id.* at 104:1-6 ([redacted]) (**Ex. 9**).

[12] *Compare* Opp. at 8-10 *with* Casper Rebuttal Decl. at 16.

[13] M. Critchley, *Medical Aspects of Boxing, Particularly from a Neurological Standpoint*, 1 BR. MED. J. 5015, 357-62 (1957).

[14] Casper Decl., Table 3.

Lastly, and as Dr. Hoshizaki explains, head trauma can produce changes to tau deposits, white matter, brain reserve, and serum neurofilament light polypeptide.[15] Studies have reported that athlete populations, after exposure to a season of contact sports and ***without reporting any concussions***, show white matter changes in comparison to controls.[16] This damage to white matter and depletion of brain reserve is associated with increased rates and earlier onsets of NDDCs.[17] This is a present cellular injury, and Dr. Hoshizaki has opined that the average NHL player is exposed to permanent cell changes from a single game, based on his representative sample study and the literature reporting cell damage thresholds.[18] In any event, the NHL's duty and breach of that duty turns on knowledge of NDDCs, not subcellular changes to the brain, and these brain changes signify the present injury necessary for medical monitoring

B. The NHL's "Approach" to Player Safety and Warnings of the Risks of Head Hits Has Never Been Sufficient

Touting "efforts" to improve head safety, the NHL seeks to excuse its admitted failure to warn players by emphasizing non-party NHLPA's alleged role in safety and rules. The NHL then describes uniform policies, rules, messages, videos, brochures, and warnings, disseminated in uniform ways, at the same times, in the same settings, to all players providing an issue of fact supporting certification.

---

[15] Hoshizaki Decl., ¶¶11-12, 31-38, 65.

[16] *Id.*

[17] Cantu Decl., §IV.A.5.

[18] Hoshizaki Rebuttal Decl., ¶27; Mot. at 26-27, 59 (citing *Bouaphakeo*).

At pains to point out what it has done to prevent head injuries, the NHL actually admits through Commissioner Bettman what it failed to do: provide warnings to players that repeated head hits[19] increase players' risk of developing NDDCs, including CTE. The NHL admits that it will ***never*** give such warnings until "the medical community say[s] that this [proven causative link] is what they as professionals and practitioners have found to be the case….And so they're not warning because they don't believe that there's a basis to warn." Bettman Dep. 163:16-165:7; Campbell Dep. 263:18-25.[20]

III. REPLY ARGUMENT

A. Class 1 Meets the Requirements of Rule 23(b)(2)

1. Plaintiffs' Proposal Is Properly Evaluated Under Rule 23(b)(2)

The NHL contends that Plaintiffs' medical monitoring proposal for Class 1 should be evaluated under Rule 23(b)(3), not (b)(2), because it seeks money damages to fund future medical screening expenses. Opp. at 29. Case law says otherwise.

Plaintiffs' proposed monitoring program is analogous to other programs courts have concluded constitute injunctive relief, in concussion and other "exposure" cases.

---

[19] The Daly Declaration tries to hide the NHL's long-standing permission of intentional head hits. *See, e.g.*, ¶¶24-25 (discussing intentional ***illegal*** hits). But the NHL's rules still permitted "legal" head hits – even if intentional – such as head hits not involving a hit "by a stick, a deliberately raised elbow or forearm, and hit from behind resulting in a major boarding penalty." Daly Decl., ¶27. *See also id.*, ¶19; Deposition of Colin Campbell 143:23-144:11 (**Ex. 10**); Deposition of Gary Bettman 312:1-13, 318:12-15 & Ex. 25 (**Exs. 11, 12**).

[20] The NHL, not the NHLPA, exerted the "greatest influence" on "safety matters." Deposition of John Rizos 310:1-311:5 (**Ex. 13**). The Concussion Working Group is "pretty much run by the NHL," and the NHL "pretty much decides what studies are going to happen." *Id.* 215:8-20.

See In re NCAA Student-Athlete Concussion Injury Litig., 2016 WL 3854603, at *7 (N.D. Ill. July 15, 2016); *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 22 (D. Mass. 2010); *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 559-60 (S.D.N.Y. 1995); *Elliott v. Chi. Hous. Auth.*, 2000 WL 263730, at *15 (N.D. Ill. Feb. 28, 2000); *In re Diet Drugs Prods. Liab. Litig.*, 1999 WL 673066, at *18 (E.D. Pa. Aug. 26, 1999); *In re NLO*, 5 F.3d 154, 159 (6th Cir. 1993); *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 337-39 (C.D. Cal. 1998); *see also* MANUAL FOR COMPLEX LITIG. (Fourth) at 427 (2004).

Although the NHL asserts the cases Plaintiffs cited are distinguishable, the NHL entirely fails to distinguish them. First, the NHL argues that *Donovan* involved a proposal for a program "staffed with medical personnel," whereas Plaintiffs' program would occur at "regional hospitals or centers across the United States and Canada." The NHL ignores that *Donovan* actually was limited to Massachusetts residents, 268 F.R.D. at 5, so a centralized program was logical. Plaintiffs here, as in *Donovan*, seek to certify a small class of approximately 5,145 retirees geographically decentralized, so employing a "constellation of 'regional hospitals or centers across the United States and Canada'" increases efficacy. The case from which *Donovan* took its standard contains ***no requirement*** that the medical monitoring program be confined to a centralized location. *See Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 483-84 (E.D. Pa. 1997). Plaintiffs' proposed medical monitoring program satisfies the *Donovan* injunctive relief standard. *Donovan* recognized that a "court-supervised medical monitoring program through which the class members will receive periodic medical examinations" constitutes injunctive

relief. 268 F.R.D. at 22; *see also Arch*, 175 F.R.D. at 484 (court supervised program of periodic medical examinations was paradigmatic request for injunctive relief).

Next, the Eighth Circuit reversed in *In re St. Jude Med., Inc.*, because the class did not satisfy Rule 23(b)(2)'s cohesiveness requirement, a problem absent here. The proposed Rule 23(b)(2) class lacked cohesiveness because each heart valve implant patient "***already require[d] future medical monitoring as an ordinary part of his or her follow-up care***. A patient who has been implanted with the Silzone valve may or may not require ***additional*** monitoring." 425 F.3d 1116, 1122 (8th Cir. 2005). Here, by contrast, as Plaintiffs already explained, no Class member is currently receiving or entitled to receive ***any*** medical monitoring apart from the relief this case seeks. The court also left intact Judge Tunheim's holding that monitoring, research, epidemiological studies, and information sharing constitutes injunctive relief, even if defendant was liable to fund the trust. *St. Jude*, 2003 WL 1589527 at *12.

Moreover, the NHL's cases are distinguishable because plaintiffs in those cases sought to establish a medical monitoring fund, rather than a program. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1194 (9th Cir. 2001) ("Zinser's amended complaint does not seek the establishment of a medical monitoring program…but rather seeks 'the creation of a medical monitoring fund."); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 611 (W.D. Wash. 2001) (quoting *Werlein v. United States*, 746 F. Supp. 887, 895 (D. Minn. 1990), *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992)) ("The proposed class here seeks a fund established by defendants. Although the plaintiff now characterizes the relief as a program rather than a fund, the bottom line is

money.'"); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995) (containing no information about the plaintiffs' proposed medical monitoring class other than "the relief sought was primarily money damages"; Tenth Circuit acknowledged that "certification of a class under such circumstances [would have been] legally permissible under Rule 23(b)(2)."). *Id.*

B. Choice-of-Law Rules Favor Class Certification

Minnesota choice-of-law rules are clear. *See* Flow Chart (**Ex. 14**):

1) The Court must make its choice-of-law determination on an issue-by-issue basis, with a separate choice analysis for the substantive duty issue and the remedial medical monitoring issue. *See Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990) ("that New York substantive law was followed in determining the substantive right of recovery… does not in itself resolve the choice-of-law issue concerning prejudgment interest"). The NHL ignores this mandate. And contrary to Defendant's criticism, Plaintiffs do not need to avoid New York monitoring law. New York does *not* require a mature disease state. *See Baker*, discussed *infra* at 18.

2) The Court must apply the law of the forum where forum law characterizes a particular issue as remedial even if stark conflicts exist. *See Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596 (8th Cir. 2007). The NHL argues perceived differences in states' monitoring laws. But Minnesota treats monitoring as a remedial matter so Minnesota law applies no matter the state-by-state differences.

3) Substantive-law conflicts analysis is fact-specific, requiring consideration of states' contacts with class members' claims and legal theories and states'

governmental interests in having their substantive legal elements apply. *St. Jude*, 425 F.3d at 1120. Here, Class members' cellular damage occurred repeatedly in multiple venues controlled by the NHL, and the interests are not compensatory but relate solely to regulating a specific type of corporate conduct – failure to warn – that by law "occurred" in New York.

1. The Elements of Minnesota's Monitoring Remedy Apply

The NHL agrees that Minnesota's choice-of-law rules apply. Yet it argues that ***other states'*** characterization of monitoring as substantive should apply, which violates Minnesota's choice-of-law rules. Contrary to the NHL's argument, the court in *Nesladek v. Ford Motor Co.*, 46 F.3d 734 (8th Cir. 1995), actually resolved the novel question presented by the "useful life" statute under *Zaretsky*'s general principles of what "substantive" means, and did not depend on extrajurisdictional law. Minnesota courts have repeatedly addressed the issue and ***determined*** that monitoring is remedial; how other states may characterize it is irrelevant. *See Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 721 (Minn. Ct. App. 1998) (characterizing request for "medical monitoring expenses" as issue related to "existence and extent of these alleged damages"); *Palmer v. 3M Co.*, 2005 WL 5891911 (Minn. Dist. Ct. Apr. 6, 2005) (monitoring not recognized as "independent theory of recovery" and describing it as "elements for future damages"); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 552 (D. Minn. 1999) (Minnesota does not recognize monitoring as independent tort); *Werlein*, 746 F. Supp. at 904 (requesting recovery of monitoring costs is an element of tort damages).

The NHL does not cite a single Minnesota case finding that monitoring relief constitutes a substantive area of law, admitting that precedent characterizes monitoring as a remedy, just not in the context of a choice-of-law analysis. Opp. at 41. But this argument fails under *Nesladek*, where the court determined that Nebraska law was substantive for purposes of a choice-of-law analysis because Nebraska case law said it was, even though the precedent was not "***a conflicts case***." 46 F.3d at 737-38 (emphasis in original).

Searching for something to hang its hat on, the NHL points out that some courts conducted a conflict-of-law analysis to determine which monitoring law to apply, rather than simply applying the remedial law of the forum. *See, e.g.*, *St. Jude*, 2003 WL 1589527, at *9 (D. Minn. Mar. 27, 2003); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 602 (D. Minn. 2005). But in those cases, the courts never addressed whether monitoring is "substantive" or "remedial" under Minnesota law—no one raised those issues. This Court should not read anything into those courts' conflicts analysis. *See In re Levaquin Prods. Liab. Litig.*, 2010 WL 7852346, at *8 (D. Minn. Nov. 9, 2010) (rejecting precedent of conflicts analysis where courts had not "paus[ed] to consider" substantive/remedial distinction). Minnesota's rule is settled: If a court determines that an issue is remedial or procedural, it is error to do anything except apply forum law. *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983).

Next, the NHL relies on *Burke v. DJO*, to say Minnesota's procedural law should not be used to obtain relief not available elsewhere, but that ruling depended on the lack of any of the *Burke* parties, including defendants, having sufficient contacts with

Minnesota to pass the constitutional threshold. 2012 WL 383948, at *4 (D. Minn. Feb. 6, 2012). The NHL nowhere identifies where medical monitoring is "not available."

Finally, the NHL attempts to distinguish *Levaquin* by arguing that monitoring differs from punitive damages because it is "intertwined" with negligence duties. But punitive damages also have an underlying liability predicate, *Jacobs v. Farmland Mut. Ins. Co.*, 377 N.W.2d 441, 445 (Minn. 1985) ("no separate cause of action for punitive damages"—"there must be an independent tort"), negating the NHL's effort to avoid *Zaretsky*.

2. Minnesota's Choice-Influencing Factors Favor Application of New York's Duty Standards

The NHL's choice-influencing-factor analysis is two-faced: certain that New York tort duties should not apply, but ambivalent about whether the laws of where each player lived "during most of his career" or where he lived "during retirement" (Opp. at 39) should apply. The NHL makes no principled argument.

a. Predictability

This factor generally does not apply in personal injury cases. But NHL's control over the style of play and its decisions to withhold material information from players, conduct occurring in New York, indicates New York law would apply more predictably. The NHL relies on *Dryer v. NFL* even though *Dryer* was about the infringement of players' ***current*** publicity rights. 2013 WL 5888231, at *6 (D. Minn. Nov. 1, 2013). The intellectual property infraction thus took place where players lived. Here, Class members' cell damage occurred at NHL arenas across North America. The NHL ignores *Mooney v. Allianz Life Ins. Co.*, 244 F.R.D. 531 (D. Minn. 2007) and the Restatement (Second) of

Conflict of Laws, which hold that the locale of a defendant's offending conduct guides, particularly "[w]hen the injury occurred in two or more states." Mot. at 50.

That the NHL did not operate out of New York until 1977 does not matter. Plaintiffs are happy to limit the Class definition to those who played from 1977 onward.

b. Governmental Interest

Plaintiffs have done a side-by-side comparison of states' laws establishing duty and breach negligence standards. Only three states differ with New York, and only in part: Nebraska's, New Mexico's,[21] and Arizona's nonuse of "foreseeability" as establishing a tort duty.[22] Zimmerman Decl., Ex. 142. These states view foreseeability as a fact issue solely for the jury, but have not claimed a superior interest in applying their duty standards. New York, however, has asserted a superior interest in having its conduct-regulating duty elements apply because the NHL's failure to disclose is considered by law to have taken place in New York. Mot. at 51. Applying New York's tort duties will not offend Minnesota's policy of permitting states to regulate their own businesses in this manner, Mot. at 51-52 (citing *Fluck v. Jacobson Mach. Works, Inc.*, 1999 WL 153789, at *3 (Minn. Ct. App. Mar. 23, 1999)), whereas removing judges from

[21] *Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 326 P.3d 465, 473 (N.M. 2014). Plaintiffs originally incorrectly characterized Washington as a non-foreseeability state. *See McKown v. Simon Prop. Grp.*, 344 P.3d 661, 665 (Wash. 2015) ("duty to use ordinary care is bounded by the foreseeable range of danger").

[22] NHL incorrectly claims additional states differ. *See Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 106 (Iowa 2012) ("The critical element in establishing a duty is the foreseeability of harm to a potential plaintiff."); *RGR, LLC v. Settle*, 764 S.E.2d 8, 19 (Va. 2014) (instead of "foresee," Virginia uses the synonym "apprehend."). NHL also asserts that some states cite foreseeability as the sole factor and some include it as one factor among others. However, in all but these three jurisdictions, foreseeability alone sufficiently establishes a duty, even if other factors may contribute. *See* NHL Exhibit 58.

the foreseeability question risks offending Minnesota's policy of deciding foreseeability as a matter of law when the issue is clear. *Foss v. Kincade*, 766 N.W.2d 317, 322-23 (Minn. 2009).

Blake, *Hughes*, *Baycol*, and *St. Jude*, which the NHL incorrectly presents as an "Eighth Circuit" ban on applying the negligence standards of New York to Class members, do not excuse the parties or the Court from applying Minnesota's rules to the specific facts of this case. In *In re Baycol Prods. Liab. Litig.*, 218 F.R.D. 197, 207, 212 (D. Minn. 2003), in determining that the law of the state of plaintiffs' residence should apply, the court relied on the fact that Baycol was prescribed, ingested, and resulted in injury there.[23] In *St. Jude*, the court determined that "states in which class members were implanted" with a device had a significant interest. 2003 WL 1589527, at *10. In contrast, players' cellular damage did not occur in their homes or hospitals, but on NHL-controlled ice rinks throughout North America. Where players live now is the ***least likely place*** their cell damage occurred.

In *Hughes*, the defendant's domicile was not important because Wal-Mart's Arkansas headquarters had the slightest connection to the plaintiff's injury in Louisiana, when Wal-Mart did not manufacture the defective goods, and the injury did not occur at any of its stores. Similarly, in *Nelson v. Delta Int'l Mach. Corp.*, 2006 WL 1283896 (D. Minn. May 9, 2006), the defendant's state of incorporation was not its principle place of business or where it designed, manufactured, or launched its product into the stream of

[23] In *In re Prempro*, the court applied the law of class members' states because plaintiffs created 24 state-based subclasses and ***stipulated*** that state law of each subclass would govern. 230 F.R.D. 555, 562 (E.D. Ark. 2005).

commerce. Furthermore, plaintiffs in *Blake* and *Hughes* framed the governmental interest as "compensating" tort victims, making their residences relevant. *Blake Marine Grp. v. CarVal Inv'rs LLC*, 829 F.3d 592 596 (8th Cir. 2016); *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 621 (8th Cir. 2001). Here, the choice-of-law issue is cabined to the existence, and breach, of the NHL's duty, not compensation.

3. Applying Minnesota and New York Law Is Constitutional

The NHL challenges the constitutionality of applying Minnesota law under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), because most Class members are not "Minnesota residents" and that Minnesota did not field a team for seven years. The NHL ignores binding Supreme Court precedent.

In *Sun Oil Co. v. Wortman*, the Supreme Court held that *Shutts*'s significant contacts test applies only to issues of substantive law and does not disallow courts from applying forum law to "control the remedies available," regardless of forum contacts with class members' claims. 486 U.S. 717, 730 (1998); *see also Shutts*, 472 U.S. 797, 832 n.11 (Stevens, J. Concurring) (although Kansas did not have sufficient contacts to apply its substantive law, defendant "could not contend that the Constitution bars a Kansas court from applying the Kansas postjudgment interest statute" extraterritorially). Because Minnesota characterizes monitoring as a remedy, its interest as the forum is "irrefutable," regardless of any additional contacts. 472 U.S. at 832 n.11. To the extent their argument implies otherwise elsewhere, Plaintiffs now clarify it.

4. Applying Minnesota's Monitoring Remedy Does Not Violate the Rules Enabling Act

The NHL invokes the Rules Enabling Act to argue that using Rule 23 to apply Minnesota's remedial rules would supplant other states' approaches addressing monitoring claims. But the Act applies only to Federal Rules of Civil Procedure that "abridge, enlarge or modify ***any substantive right***." 28 U.S.C. §2072(b). Furthermore, a state's law may have extraterritorial effect so long as it passes the significant contacts test, which imposes the "modest restrictions" already discussed. *Shutts*, 472 U.S. at 818. It is not Rule 23 that allows Minnesota to apply its law extraterritorially, the Due Process clause does.

5. Claimed State Law Differences are Not Outcome-Determinative

The NHL asserts that mere "differences" among state laws prohibit certification, ignoring that any differences must change the outcome under the facts of this case. *Id.* at 839 ("If the laws of both states ***relevant to the set of facts*** are the same, or would produce the same decision in the lawsuit, there is no real conflict between them."). Even if the Court rejects Plaintiffs' choice-of-law analysis, if "differences" do not change the outcome, ***forum law still applies***. Mot. at 52. True, some states require a present injury, while some merely require exposure plus an increased risk. Because all players proffer evidence of present cellular injury, however, these "differences" would not change the outcome here.

NHL-cited cases are distinguishable because they involved some class members who had *no* present injury. *St. Jude*, 425 F.3d at 1122 (differences would be relevant as

between exposure-only class members and those with present injuries); *Foster*, 229 F.R.D. at 603, 605-06 ("divergence" of monitoring standards relevant where plaintiffs included both exposure-only and present-injury class members); *Prempro*, 230 F.R.D. at 569 (no plaintiff alleged present injury, but were all merely "asymptomatic"); *Baycol*, 218 F.R.D. at 202 (medical monitoring class limited to "asymptomatic" class members).

Defendant's statement that some states like New York restrict medical monitoring to those manifesting a disease is "absurd": "[R]equiring plaintiffs to manifest physical symptoms before receiving medical monitoring would defeat the purpose of that remedy. The entire point of medical monitoring is to provide testing that would detect a patient's disease *before* she manifests an obvious symptomatic illness, thus allowing earlier treatment[.]" *Baker v. Saint-Gobain Performance Plastics Corp*., 232 F. Supp. 3d 233, 252 (N.D.N.Y. 2017) (holding that *Caronia v. Philip Morris* does not require symptoms or disease, allowing monitoring relief merely where toxin accumulated in blood); *see also Lowe v. Philip Morris USA*, 183 P.3d 181 (Or. 2008) (Walters, J., concurring) (cited with approval in *Caronia*) ("present physical harm" includes "physical effects," even without symptoms).

The NHL cites no authority holding that "increased risk" and "significantly increased risk" meaningfully diverge (*e.g.*, certainly an ***insignificantly*** increased risk would not satisfy Utah law), or that the "more likely than not" burden-of-proof would differ.[24] The NHL provides no reason to eschew traditional preponderance of the

[24] Forum-state law dictates whether burden of proof is procedural. *State Mut. Life Assur. v. Wittenberg*, 239 F.2d 87, 89 (8th Cir. 1956). Minnesota applies its burden of proof

evidence standards. Plaintiffs have also shown that procedures exist to detect and treat NDDC as to all players. Cantu Supp. Decl., ¶¶112-152. Whether some states ***do not*** require these extra proofs is therefore moot, and Minnesota monitoring law thus applies to all but 12 jurisdictions. Mot. at 54.

Similarly, the duty and breach elements of Plaintiffs' negligence claims by-and-large do not present outcome-determinative differences. "[T]he definition of negligence … is substantially identical in all jurisdictions." *Patton v. Topps Meat Co.*, 2010 WL 9432381, at *9 (W.D.N.Y. May 27, 2010); *see also In re Telectronics Pacing Sys., Inc., Accufix Atrial J Leads Prods. Liab. Litig.*, 164 F.R.D. 222, 230 (S.D. Ohio 1995); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 460-61 (D. Wyo. 1995). *Baycol* dealt with differences in strict liability standards (not at issue here), 218 F.R.D. at 605, and the negligence claim at issue in *In re Rhone-Poulenc Rorer* included proximate cause and comparative fault elements, and a novel "serendipity" theory of liability, whereas the issues here are only duty of care and breach, 51 F.3d 1293, 1301-03 (7th Cir. 1995). Where only duty is at issue, even *Rhone-Poulenc* agrees, "[T]he law of negligence is one, not only nationwide but worldwide. Negligence is a failure to take due care …. A jury can be asked whether the defendants took due care." *Id.* at 1300.

Importantly, the NHL does not contest the uniformity of law on two crucial propositions: 1) that a duty arises when the NHL voluntarily undertakes to protect players, and 2) that the NHL's failure to warn of dangers which it should have known

---

because it is "procedural." *Jones v. Chicago, St. P., M. & O. Ry. Co.*, 83 N.W. 446, 447 (Minn. 1900).

would breach its tort duties. Because no outcome-determinative conflicts exist concerning the NHL's assumption of duty,[25] the Court should certify a multi-jurisdiction class under Rules 23(b)(2) and (c)(4) as to the issues of duty and breach under Minnesota law.[26]

Finally, the NHL cites no authority in response to Plaintiffs' alternative motion to certify a 36-state monitoring class under Rule 23(b)(2) and a nationwide issues class pursuant to the grouping procedure outlined in §III.F of their opening brief.

C. Individualized Factual Determinations Do Not Preclude Class Certification of Class 1

The NHL impermissibly seeks to defeat class certification by manufacturing individualized "factual issues" related to the NHL's duty, breach of that duty, Plaintiffs' injury and causation, and the NHL's affirmative defenses.

1. All Class Members Deserve Medical Monitoring

The NHL cites *St. Jude*, 425 F.3d at 1122, for the proposition that "each plaintiff's ***need*** . . . for medical monitoring [would be] highly individualized."[27] However, in their Motion, Plaintiffs fully explain that *St. Jude's* facts supporting reversal of a Rule 23(b)(2) class are not present here. Mot. at 58 & n.209. Even the Court in *Hood v. Gilster-Mary Lee Corp.*, 2016 WL 5852866, at *8 (W.D. Mo. Sept. 30, 2016), construed *St. Jude's*

[25] Also, Minnesota's foreseeability-based duty is consistent with all but Arizona, Nebraska, and New Mexico, *see supra*, still allowing for a broad class on that theory alone.

[26] Assumption of risk and comparative fault relate to calculation of damages. Minn. Stat. §604.01, subd. 1a. No damages class is sought.

[27] Opp. at 49.

denial of the Rule 23(b)(2) medical monitoring class "narrowly," stating a revised class, "might well be found to meet the requirements of certification."

2. Factual Variations Do Not Defeat Certification

Rule 23(b)(2) class certification does not require Plaintiffs to show that legal questions and common facts predominate, or that a class action is superior to other available methods. Rule 23(b)(2) only precludes certification when the class totally lacks cohesiveness. *See In re Diet Drugs*, 1999 WL 673066, at *9-10.

Because Plaintiffs' claims are rooted in the NHL's uniform, admitted failure to warn of NDDCs, questions of when the NHL learned certain facts and issued inadequate warnings are irrelevant to Class 1's request for medical monitoring certification under Rule 23(b)(2). In *Leiting-Hall v. Winterer*, 2015 WL 1470459, *5, 8 (D. Neb. Mar. 31, 2015), the Court granted Rule 23(b)(2) certification of a class of food stamp applicants, despite "various factual scenarios [that] may affect the timing" of the applications, and found the class cohesive because "alleged deficiencies in processing applications are common to the group of applicants as a whole and any relief afforded will be to the ***benefit of the entire group***." Because class members were all subject to the challenged conduct, the class meets the cohesiveness test.

3. Common Evidence Establishes the NHL's Duty and Breach

The NHL's attack on duty and breach is contrary to NHL internal documents and numerous experts showing the NHL ***has always***: (1) had sufficient knowledge triggering its duty to warn its players; (2) voluntarily assumed a duty of care to its players; and (3)

breached its duty to its players and ***continues*** to do so by failing to warn. The ultimate resolution of these issues is common to the class, warranting Rule 23(c)(4) certification.

The NHL first argues that because evidence related to the long term risks of head trauma has evolved, the NHL's duty to warn based upon its knowledge over time creates an individualized issue. However, by 1968 the Fifth Circuit held that CTE was already sufficiently well-known enough to negate *mens rea*. *Nagell*, 392 F.2d at 937.

Next, the NHL prematurely argues that evidence as to whether the NHL voluntarily assumed a duty of care to the Class will vary over time.[28] *See Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 1992 WL 121726, at *21 (N.D.N.Y May 23, 1992) ("[T]he issue of whether . . . a special relationship of trust and confidence . . . could form the basis for an independent tort duty of care, is, . . . a factual issue for the jury."). Having control over player safety since inception, the NHL admitted it has "***always*** assumed the responsibility of making the game safer"[29] and has the superior resources to do so.

Lastly, the NHL argues that due to varying warnings and rule changes over time, evidence relevant to its breach will vary, ignoring the NHL ***still*** denies any causal link between hockey and head hits or head hits and long-term neurological diseases. The NHL admits a duty breach by confirming it issued no warnings prior to 1997. Moreover, the NHL's post-1997 warnings were inadequate, because they failed to warn of the long

[28] The NHL does not contest Plaintiffs have proffered common evidence of the NHL's duty of care based on its creation of a foreseeable risk of harm. Mot. at 61-62.

[29] Zimmerman Decl., Ex. 18.

term effects of NDDCs, and were undermined by the NHL's own public statements. In addition, the evaluation of whether a supposed warning is adequate is objective and can be answered collectively. *Billiar v. Minn. Min. & Mfg. Co.*, 623 F.2d 240, 245 (2d. Cir. 1980). The NHL has never fulfilled its duty of care to its players, and its admission of certain belated actions commensurate with its duty in 1947[30] supports rather than defeats class certification.

Should the Court find the NHL has proffered ***indisputable*** evidence that the NHL's belated actions extinguish its liability as to a certain time, this will not defeat class certification. *See Gawarecki v. ATM Network, Inc.*, 2014 WL 2600056, at *18 (D. Minn. June 14, 2014) (granting class certification and ***narrowing class period*** based upon "uncontroverted evidence" as to when required notice occurred); *see also* Fed. R. Civ. P. 23(c)(1)(C).

4. Common Evidence Establishes the Requisite Medical Monitoring Injury

Through numerous experts and scientific literature, Plaintiffs have presented common evidence supporting their claims.[31] In response, the NHL argues that head trauma may not cause cellular changes to the brain, that cell changes to animal neurons could not be applied to human neurons, and flatly ignores the literature where human brains were demonstrated to experience white matter loss after a season of participation

[30] Opp. at 25-27; 55-56.

[31] Cantu Decl., §IV.A.5; Hoshizaki Decl., §IV.B; Hoshizaki Supp. Decl., ¶¶26-31; Cantu Supp. Decl. at 10-12; Mot. at 26-28, 59-60.

in a contact sport.[32] Even if that were true, the common evidence drives an answer ending the litigation in one fell swoop for every class member.

5. The NHL's Purported Individualized Issues Undermining Medical Monitoring are Incorrect and Misleading

a. Positional Exposure to Head Trauma Varies Only Nominally

The NHL argues that different hockey positions have different concussion incidence rates, raising individualized issues precluding certification, ignoring Dr. Hoshizaki's accounting for these variables.[33] Dr. Hoshizaki rebutted this argument in its entirety: goalies receive 4.5% of concussions, but typically play entire games without substitution while other positions receive a greater percentage of total concussions distributed across a larger number of part-time players.[34] Next, the NHL argues that concussions are unevenly distributed, as demonstrated by "a study by Navigant" that is little more than a regurgitation of the NHL's own flawed concussion reporting, as Bill Daly, Julie Grand, Kris King, Willem Meeuwisse, Ruben Echemendia, and others privately admit.[35] Despite such rampant underreporting of concussions, the NHL now claims that such data is reliable proof to preclude certification. Accepting such flawed

---

[32] Opp. at 58-59.

[33] Hoshizaki Decl., ¶¶62-64 (Noting that "although the risk for head impacts was not identical for all positions, the levels of head impact exposure did not materially vary"); Table 9.

[34] *Id.*

[35] *See, e.g.*, NHL0035193; NHL1826210; NHL2130456 (**Exs. 15, 16, 17**).

reasoning would require one to believe, *inter alia*, "[the New Jersey Devils] only sign players who are immune to concussions."[36]

6. The NHL's Affirmative Defenses Do Not Prevent Certification

The NHL's argument that individualized evidence relevant to affirmative defenses prevents certification fails. Only the issues of 1) duty, 2) breach, 3) exposure to a hazard caused by Defendant, and 4) present cellular damage that increases the risk of NDDCs are before the Court on Plaintiffs' class certification under Rule 23(b)(2), and common evidence will determine ***the NHL's conduct*** and whether it breached its duty to Plaintiffs. Damages elements relating to Plaintiffs' or any third party's conduct are not at issue.

Most of the NHL's affirmative defenses[37] (*i.e.*, contributory/comparative negligence, assumption of the risk, release of claims, and allocation of fault to third parties) are irrelevant for this motion because they address damages issues having no bearing on liability. *See Springrose v. Willmore*, 192 N.W.2d 826, 827 (Minn. 1971) (assumption of risk is "apportioned under our comparative negligence statute"); Minn. Stat. 604.01, subd. 1a (stating that plaintiff-responsibility defenses do not bar action but relate to apportionment of damages); *In re Target*, 309 F.R.D. 482, 489 (D. Minn. 2015) (holding comparative fault is "classic" damages mitigation defense and does not defeat certification). Without a determination of whether a defendant owed a duty and breached

[36] NHL1479965 (**Ex. 18**).

[37] Plaintiffs contend that the NHL's statute of limitations defense is inappropriate here because it was the NHL's continuing negligence and omission of material facts that caused Plaintiffs to be unware of their injuries and damages. Moreover, the statute of limitations should be tolled.

its duty, no need exists to determine whether the plaintiff assumed the risk. *See Baber v. Dill*, 531 N.W.2d 493, 495 (Minn. 1995); *Prokop v. Indep. Sch. Dist. No. 625*, 754 N.W.2d 709, 716 (Minn. App. 2008).

Even assuming that the NHL may assert some of its affirmative defenses (specifically those alleging assumption of the risk and statute of limitations), it must provide actual evidence sufficient to meet "the same rigorous inquiry as plaintiffs' claims," and cannot rely on scenarios of hypothetical individual differences. *In re Zurn Pex Plumbing Products Liab. Litig.*, 644 F.3d 604, 619 (8th Cir. 2011). Rule 23(b)(2) certification is still appropriate because it is the NHL's burden to conclusively establish the existence of an affirmative defense. *Doran v. Mo. Dep't of Soc. Servs.*, 251 F.R.D. 401, 406 (W.D. Mo. 2008); *see also In re Deutsche Telekom Ag Sec. Litig.*, 229 F. Supp. 2d 277, 284 (S.D.N.Y. 2002) (finding that "the class certification stage of the litigation is an inappropriate time to inquire into the merits of plaintiffs' claims and, by extension, defendants' affirmative defenses") and they have failed to do so.

a. The NHL's Assumption of the Risk Defense Fails

The NHL's argument that players assumed the risk also baldly contradicts its ***denial*** that repetitive brain trauma increases the risk of developing NDDCs in order to credit the NHL's defense that it adequately warned. The internal contradiction destroys the NHL's argument.

Under Minnesota law, a plaintiff must appreciate the risk and have knowledge of the "particular danger" associated with the risk. *Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167, 169-70 (Minn. 1980); *see Bakhos v. Driver*, 275 N.W.2d 594 (Minn.

1979).[38] Contrary to the NHL's litigation position, sufficient evidence shows the Plaintiffs were unaware of the risk.

b. The NHL's Statute of Limitations Defense Fails

The NHL's statute of limitations defense fails because Plaintiffs did not know that repeated head trauma increased the risk of developing NDDCs. A party's continuous omission of relevant facts (whether negligent or fraudulent) tolls the statute of limitations.[39] *See Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968); *Haberle v. Buchwald*, 480 N.W.2d 351, 356 (Minn. App. 1992). Establishing when the statute of limitations begins to run centers solely on ***the plaintiff's knowledge***: "When determining whether a plaintiff was 'actually aware' of the facts upon which a claim is based, the question is whether the plaintiff actually knew or should have known." *Haberle*, 480 N.W.2d at 356.

The NHL should not be rewarded for its negligent omissions and misrepresentations. The NHL's own continuing behavior kept Plaintiffs from knowing the correlation between NDDCs and repetitive head trauma. To allow the NHL to benefit from its negligence would be both inequitable and contrary to the purpose of the

[38] New York law similarly requires the plaintiff must not only be aware of the risk, but appreciate its "nature." *Bukowski v Clarkson Univ.*, 971 N.E. 849, 850 (N.Y. 2012); *Lamey v. Foley*, 188 A.D.2d 157, 167 (N.Y. App. Div. 1993) (finding that the plaintiff must voluntarily participate in the injurious activity with full "knowledge of the injury-causing defect [and] appreciation of the resultant risk.")

[39] Under New York law, the statute of limitations is tolled where the defendant acted to conceal the existence of the cause of action from the plaintiff. *See Meridien Int'l Bank v. Liberia*, 23 F. Supp. 2d 439, 446 (S.D.N.Y. 1998). The statute of limitations will not begin to run until the plaintiff "acquired actual knowledge or should have acquired actual knowledge through the exercise of reasonable diligence." *Id.*

limitations defense. *See Erbe v. Lincoln Rochester Tr. Co.*, 13 A.D.2d 211, 213 (N.Y. App. Div. 1961). For all these reasons,[40] Plaintiffs' statute of limitations defense fails.

D. Class 2 Meets the Standards for Rule 23(c)(4) Certification

St. Jude does not preclude issue certification where doing so will increase judicial efficiency. Following *St. Jude* this Court, and others within the Eight Circuit, have granted issue certification for liability-only classes like the one Plaintiffs offer here. *See, e.g.*, *Cruz v. TMI Hosp., Inc.*, 2015 WL 6671334 (D. Minn. Oct. 30, 2015); *Sellars v. CRST Expedited, Inc.*, 321 F.R.D. 578 (N.D. Iowa 2017); *In re: Simply Orange Juice Marketing & Sales Practices Litig.*, 2017 WL 3142095 (W.D. Mo. July 24, 2017). Even the NHL's lead case, *Ebert v. Gen. Mills, Inc.*, recognized that "a class action serves to conserve the resources of the court and the parties ***by permitting an issue that may affect every class member to be litigated in an economical fashion***" and that the "predominance inquiry…***goes to the efficiency of a class action as an alternative to individual suits.***" 823 F.3d 472, 477-79 (8th Cir. 2016).

Here, issues surrounding duty, breach, and general causation are the most complex, expensive, and time-consuming issues in this litigation. One need look no further than the 24 experts the parties offer primarily to address these very issues. Each of these issues is common to the Class.

[40] In addition, even if the NHL claims that some class members may be affected by the limitations defense, a common proffer will likely establish a factual predicate necessary for a tolling determination. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297 (1st Cir. 2000).

The threshold issue of "heightened risk" will be established primarily through epidemiological evidence. As Dr. Comstock explains, that evidence shows those who are at a ***heightened risk*** for concussion are also at a ***heightened risk*** for NDDCs. That opinion is built upon numerous studies of thousands of patients, their concussions, and the long-term effects of them. The NHL attempts to rebut these opinions through its own experts, who also look to the same body of published research on the topic. All this evidence, pro and con, is common to the Class, and resolution of these critical issues will substantially advance (or curtail) the claims in this case.

After heightened risk, the next common question is "when should the NHL have become aware of that risk and thus warned about it?" There are three possible answers: (1) the duty arose prior to class period; (2) the duty arose during the class period; or (3) the duty has never arisen. These outcomes are each temporal, not player specific. It is also an issue that focuses ***on the actions and knowledge of the NHL and the scientific community in general***, not facts specific to any individual player.

The next element is "breach." The NHL argues this issue is individual because it has given various warnings to its players at different times, but that entire argument presumes the NHL has given ***any*** adequate warnings. In this case, and in the press, the NHL has steadfastly denied ***any*** link between concussions and NDDCs. ***Any*** half-hearted attempt in the past by the NHL to "warn" its players of such a risk against the backdrop of its consistent denial could not be effective.

These common issues, if proven at trial, will leave only specific causation issues to be proven by each player. While Plaintiffs admit these are not simply administrative

showings that can be addressed in a simple claims process, they are not nearly as comprehensive, expensive, or complex as the common issues that would be tried together in the class phase.

E. Class 2 Is Ascertainable

The NHL avers "there is no administratively feasible way to determine who falls within the proposed class definition" (Opp. at 88), but the Eighth Circuit only requires a class definition to use "objective criteria" to ascertain the type of person who falls into it. Mot. at 40. A diagnosis of an NDDC (a defined term) is an objective fact. Either a diagnosis has been made, or it has not. The NHL argues that a diagnosis of an NDDC can be challenged, but whether the diagnosis is justified is not relevant to the class definition.

The only other criteria for Class 2 membership is likewise objective – either the person played in the NHL or they did not. Both of those determinations can be made without individual inquiries or extensive discovery rendering the class ascertainable even under the Third Circuit's heightened ascertainability test in *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).[41]

F. The Proposed Class Representatives Are Adequate

The NHL attacks Plaintiffs' adequacy arguing: (1) putative Class 1 members' future personal injury claims may be barred by res judicata, creating a conflict with the

[41] This past summer, the Third Circuit retreated significantly from its highly criticized ascertainability precedent. *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 441 (3d Cir. 2017).

proposed class representatives; and (2) that such conflict can only be cured by the appointment of independent counsel. The NHL's argument is flawed.

1. *Res Judicata* is Inapplicable

Under *res judicata* "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that ***were or could have been*** raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Here, members of putative Class 1 do not have a diagnosed NDDC, and therefore their unaccrued claims could not have been asserted in this case. *Wal-Mart v. Dukes*, 564 U.S. at 338, 397-98 (2011). *Res judicata* cannot apply to bar claims that do not yet exist, thus no conflict exists.[42]

Further, it is axiomatic that "a conflict must be 'fundamental' to violate Rule 23(a)(4)." *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242, 249 (2d Cir. 2011); *see also Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010). Moreover, a purported conflict cannot be merely speculative. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 680 (7th Cir. 2009). The NHL's argues: "*[i]f* putative members of the medical-monitoring class sought to bring personal injury cases in the future, they *could well* find themselves precluded from suing." (Opp. at 91). Such speculation is insufficient to establish a fundamental conflict.

2. The Proposed Medical Monitoring Class Is Not a Settlement Class

The NHL argues disabling conflicts exist absent the appointment of independent counsel for each of the classes. But the NHL's authority for this rests solely on cases

[42] If putative class members have been diagnosed with a NDDC, they are putative members of proposed Class 2 and not Class 1.

involving ***settlement classes*** in which future claimant subclasses were to receive certain monetary benefits in contrast to injunctive relief sought by other subclasses. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 233-36 (2d Cir. 2016). In the context of a litigation class, the presence of other structural safeguards, including the Court's ability under Rule 23(c)(1)(C) to adjust the class moots the concern. *Amchem*, 521 U.S. 710-11. No conflict exists between holders of present and future claims, as all seek injunctive relief, invalidating the NHL's arguments in this respect.

G. Plaintiffs Are Not Required to Meet the Superiority Requirements of Rule 23(b)(2)

The superiority requirement is ***not*** applicable to classes to be certified under Rule 23(b)(2). *St. Jude*, 425 F.3d at 1121. Even if a superiority requirement might be imputed to limited common issue classes under Rule 23(c)(4), such as Class 2 here, the NHL has not addressed any of its superiority arguments to Class 2 or Class 2 issues.

Most of the NHL's superiority arguments focus on the merits: whether medical monitoring is a viable remedy. If the superiority requirement applied here, the issue would be whether resolution of the medical monitoring claim on a class basis is superior to treatment of that issue on a piecemeal individual basis. Answer: Yes.

IV. CONCLUSION

Plaintiffs' Motion for Class Certification should be granted.

Dated: March 9, 2018

s/ Charles S. Zimmerman

Charles S. Zimmerman (MN Lic. #0120054)
Brian C. Gudmundson (MN Lic. #0336695)
David M. Cialkowski (MN Lic. #0306526)
ZIMMERMAN REED LLP
1100 IDS Center
80 S. 8th Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
charles.zimmerman@zimmreed.com
brian.gudmundson@zimmreed.com
david.cialkowski@zimmreed.com

Stuart A. Davidson (FL Bar #84824)
Mark J. Dearman (FL Bar #982407)
Kathleen B. Douglas (FL Bar #43240)
ROBBINS GELLER RUDMAN & DOWD LLP
120 E. Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
(561) 750-3364 (fax)
sdavidson@rgrdlaw.com
mdearman@rgrdlaw.com
kdouglas@rgrdlaw.com

Steven D. Silverman (MD Bar #22887)
Stephen G. Grygiel (MD Bar #09169)
William Sinclair (MD Bar #28833)
SILVERMAN, THOMPSON, SLUTKIN & WHITE, LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
ssilverman@mdattorney.com
sgrygiel@mdattorney.com
bsinclair@mdattorney.com

Hart Robinovitch (MN Lic. #0240515)
ZIMMERMAN REED, PLLP
14646 N. Kierland Boulevard, Suite 145
Scottsdale, AZ 85254
Telephone: (480) 348-6400
hart.robinovitch@zimmreed.com

Plaintiffs' Co-Lead Counsel

Lewis A. Remele (MN Lic. #0090724)
Jeffrey D. Klobucar (MN Lic. #0389368)
J. Scott Andresen (MN Lic. #0292953)
BASSFORD REMELE
100 South 5th St., Suite 1500
Minneapolis, MN 55402-1254
Telephone: (612) 333-3000
lremele@bassford.com
jklobucar@bassford.com
sandresen@bassford.com

Plaintiffs' Liaison Counsel

Michael R. Cashman (MN Lic. #206945)
HELLMUTH & JOHNSON PLLC
8050 W. 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
mcashman@hjlawfirm.com

Jeffrey D. Bores (MN Lic. #0227699)
Bryan L. Bleichner (MN Lic. #0326689)
CHESTNUT CAMBRONNE PA
17 Washington Avenue N., Suite 300
Minneapolis, MN 55401
Telephone: (612) 339-7300
jbores@chestnutcambronne.com
bbleichner@chestnutcambronne.com

Thomas Demetrio (ARDC #611506)
William T. Gibbs (ARDC #6282949)
CORBOY & DEMETRIO
33 N. Dearborn Street
Chicago, IL 60602
Telephone: (312) 346-3191
tad@corboydemetrio.com
wtg@corboydemetrio.com

Brian D. Penny (PA Bar #86805)
Mark S. Goldman (PA Bar #48049)
GOLDMAN, SCARLATO & PENNY PC
8 Tower Bridge, Suite 1025
161 Washington Street
Conshohocken, PA 19428
Telephone: (484) 342-0700
penny@lawgsp.com
goldman@lawgsp.com

Vincent J. Esades (MN Lic. #0249361)
James W. Anderson (MN Lic. #0337754)
HEINS MILLS & OLSON, PLC
310 Clifton Avenue
Minneapolis, MN 55403
Telephone: (612) 338-4605
vesades@heinsmills.com
janderson@heinsmills.com

Thomas J. Byrne (CA Bar #179984)
Mel T. Owens (CA Bar #226146)
NAMANNY, BYRNE, & OWENS, APC
27412 Aliso Creek Road, Suite 210
Aliso Viejo, CA 92756
Telephone: (949) 452-0700
tbyrne@nbolaw.com
mowens@nbolaw.com

Daniel E. Gustafson
David A. Goodwin
Joshua J. Rissman
GUSTAFSON GLUEK, PLLC
120 S. Sixth Street, Suite 2600
Minneapolis, MN 55402
Telephone: (612) 333-8844
dgustafson@gustafsongluek.com
dgoodwin@gustafsongluek.com
jrissman@gustafsongluek.com

Robert K. Shelquist (MN Lic. #21310X)
W. Joseph Bruckner (MN Lic. #147758)
Rebecca Peterson (MN Lic. #0392663)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue S., Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
wjbruckner@locklaw.com
rapeterson@locklaw.com

Shawn M. Raiter
LARSON KING, LLP
30 E. Seventh Street, Suite 2800
Saint Paul, MN 55101
Telephone: (651) 312-6518
sraiter@larsonking.com

Charles J. LaDuca
CUNEO GILBERT & LADUCA, LLP
8120 Woodmont Avenue, Suite 810
Bethesda, MD 20814
Telephone: (202) 789-3960
charles@cuneolaw.com

Michael J. Flannery
CUNEO GILBERT & LADUCA, LLP
7733 Forsyth Boulevard, Suite 1675
St. Louis, MO 63105
Telephone: (314) 226-1015
mflannery@cuneolaw.com

Plaintiffs' Executive Committee